Supreme Court, U.S.
FILED
AUG 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-13

IN THE

Supreme Court of the United States

October Term, 1988

OREGON PHYSICIANS' SERVICE,
an Oregon nonprofit corporation,

Petitioner,

v.

JOHN HAHN, WADE LIGGETT, JOSEPH AIZAWA,
V. G. LIVINGSTON, HUGH FRASER and HIDE AIZAWA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 2, 1989

eBCD Legal Printers, Seattle, WA

QUESTIONS PRESENTED

I. In permitting plaintiff Doctors to proceed to trial on their price-fixing claim under 15 U.S.C. §1, did the Ninth Circuit correctly view this case as "akin to *Maricopa*," when the summary judgment record showed (1) that physicians formed a majority of the Oregon Physicians' Service ("OPS") board of trustees; (2) that OPS member physicians in a wide variety of medical specialties were direct and potential competitors of podiatrists for foot care; (3) that OPS member physicians agreed to the maximum fees they would charge for foot care procedures; (4) that OPS member physicians agreed to reimburse nonmember podiatrists at a lower rate for the same procedures; and (5) that OPS membership and reimbursement policies resulted in shifts in consumer demand for foot care from podiatrists to OPS member physicians?

II. In permitting plaintiff Doctors to proceed to trial on their group boycott claim under 15 U.S.C. §1, did the Ninth Circuit correctly apply the *Matsushita* summary judgment standard to conclude that plaintiff Doctors' evidence tended to exclude legitimate pro-competitive justifications for OPS membership policies, since (1) an OPS board member testified that no such pro-competitive justifications had been considered by OPS; and (2) even if alleged "problems with podiatrist claims overutilization" was a "plausible, justifiable explanation" for OPS's refusal to admit podiatrists, it had been rebutted by evidence that podiatrists' overall costs for foot care were lower than those of OPS members?

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STATEMENT OF THE CASE

Procedural History

The Ninth Circuit opinion in *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022 (9th Cir. 1989) ("*Hahn*") summarizes the lengthy procedural history of this litigation. *Id.* at 1025. In light of the characterization by OPS of some of the earlier opinions in this case, OPS Petition at 2-3 and footnote, it is important to clarify that in *Hahn v. Oregon Physicians' Service*, 689 F.2d 840, 842 (9th Cir. 1982), the Ninth Circuit held that "[t]he defendants have introduced no evidence tending to

establish that there are any *bona fide* risk-related reasons for an insurer to distinguish between the services of M.D.'s and podiatrists, much less that such a distinction is at the core of what is commonly understood to be the 'business of insurance.' " *Id.* at 843.

The court also rejected the finding that plaintiffs had failed to meet the interstate commerce jurisdictional requirement and remanded for additional fact-finding. Defendants' petition for writ of certiorari was denied. 462 U.S. 1133 (1983). Thereafter, a trial was held on the impact of defendants' conduct on interstate commerce. After hearing fact and expert witnesses and reviewing extensive computer billing documentation, the district court held that the activities of OPS and the other remaining defendant had a "not insubstantial" effect on interstate commerce. Defendants never sought review of this intensively factual finding and OPS's suggestion that the issue is somehow open to review by this Court five years later is baseless and wholly inappropriate. OPS Petition at 4-5, footnote.

The Ninth Circuit Decision

In reviewing the summary judgment record, the Ninth Circuit was guided by and cited this Court's decisions in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972); and *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961).

The Ninth Circuit also examined circuit court opinions that specifically distinguish between (1) unilateral action

by an independent single corporate entity that purchases medical services from physicians and (2) concerted action by a horizontal combination composed of, and controlled by, the physicians who provide competing medical services.

The court found that by statute, plaintiff/respondent podiatrists (hereinafter "plaintiff Doctors") "are licensed to perform all foot procedures that medical doctors (M.D.'s) and doctors of osteopathy (D.O.'s) may perform, except that they may not administer general or spinal anesthetics or perform amputations. O.R.S. § 677.805(4)." *Hahn*, 868 F.2d at 1024. The President of OPS and its successor, Blue Cross/Blue Shield of Oregon ("BCBSO") was unaware of any distinction between foot care services provided by an OPS member physician and those provided by a podiatrist.[1]

Plaintiff Doctors presented evidence that the practice of podiatry includes procedures employed by no less than 22 medical specialties, leading the court to conclude that "many doctors are direct competitors to podiatrists, at least as to some of their services." *Id.* at 1029 and n.7. Based on comparison of this list of specialties with the OPS member physician list, plaintiff Doctors' economics expert witness determined that 73 percent of OPS member physicians in the Portland metropolitan area were in medical specialties performing some treatment of the foot.[2]

Plaintiff Doctors submitted evidence that (1) local county medical societies nominated physician members of OPS to the board of trustees, which nominees were in turn submitted to the Oregon Medical Association for approval and ultimate

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[1] CR 544 at 158. While the Ninth Circuit opinion in *Hahn* references enough of the summary judgment record to uphold its reversal of the trial court's grant of summary judgment, plaintiff Doctors will occasionally reference evidence in the record but not specifically recited by the court by the "Clerk's Record" designation.

[2] CR 597 at 5, 10.

election;[3] (2) a majority of OPS's governing board of trustees were physicians, *id.* at 1024; (3) membership in OPS was limited to M.D.'s and D.O.'s, *id.*; (4) "[f]rom 1974 to 1983, between 90 and 93 percent of all eligible M.D.'s and D.O.'s in Oregon were OPS members," *id.*; (5) based solely upon their licensure, plaintiff Doctors and all other podiatrists were not permitted to become members of OPS, *id.*; and (6) when an M.D. or D.O. became a member of OPS, he or she signed a membership agreement reflecting agreement to be bound by the Bylaws and Articles, including those provisions relating to exclusion of non-M.D.'s and D.O.'s.[4]

Plaintiff Doctors presented evidence that on two occasions, a physician-controlled OPS board of trustees decided to perpetuate the exclusion of podiatrists from membership. The Ninth Circuit referenced one of these occasions: "In 1982 the board contemplated extending membership to additional classes of providers, but decided to offer membership only to optometrists." *Id.*

In 1982, the Ninth Circuit found no evidence of "*bona fide* risk-related reasons" for distinguishing between M.D.'s and podiatrists with respect to foot care. 689 F.2d at 843. In 1989, the Ninth Circuit was equally unimpressed.[5] Without making factual determinations, the court simply noted (1) the stipulation by OPS that it would " 'not defend this case in any way on the basis that quality of health care provided by podiatrists is inferior to that provided by other providers of health care,' " *id.* at 1031; (2) evidence from an OPS board member "suggesting that the exclusion of podiatrists was prompted neither

[3] CR 544 at 160-61; 322-23.

[4] CR 544 at 111; 208-10.

[5] The cobbled-up "plausible, justifiable explanation" advanced by OPS for its conduct was so thoroughly lacking in supporting evidence in the record that the court was "unclear" even as to what it meant. *Hahn*, 868 F.2d at 1031 n.10.

by considerations of cost nor by fears of overbilling"; and (3) evidence "that the overall costs for foot procedures performed by podiatrists were lower than those of OPS members." *Id.* at 1031-32.

The overwhelming majority of policies issued by OPS, despite individual variations, reimbursed nonmember physicians differently from member physicians, "both in price and manner," *id.* at 1029, and the court so noted: "Under a majority of these policies, OPS offers a two-tier system covering health care costs." *Id.* at 1024.

OPS member physicians were paid up to the 90th percentile of fees charged by all OPS member physicians; they agreed to accept such reimbursement as payment in full and not to bill the OPS subscriber for any difference between the reimbursement and the actual fee ("balance bill"). *Id.* at 1025. Nonmembers were reimbursed in an entirely different manner — according to a fixed indemnity schedule. The effect on competition of this indemnity schedule was noted by the Ninth Circuit: "Appellants produced evidence that, on average, OPS members received from OPS 76 cents on the dollar billed while OPS paid podiatrists only 50 cents on the dollar billed." *Id.*

As OPS nonmembers, podiatrists were not precluded from "balance billing." *Id.* However, if they did, the OPS subscriber incurred an out-of-pocket expense that would not have been incurred if the service was obtained from an OPS member physician. Thus, the whole scheme under which OPS member physicians collectively agreed to be reimbursed made "economic sense":[6] such agreements helped OPS member physicians attract patients away from non-members, including nonmember podiatrists. The President of OPS and later BCBSO testified that "purely on a dollar basis, there's the reasonableness that the person is going to go to the place where he gets the least out-of-pocket cost."[7]

[6] *Matsushita*, 475 U.S. at 587.

[7] CR 544 at 174.

It makes equal "economic sense" that podiatrists ran the risk of losing money if they did not balance bill or losing patients and future referrals if they did. Plaintiff Doctors presented evidence of both types of injury, as well as showing significant skewing in consumer demand away from podiatrists' services in the market for foot care, as a result of OPS's conduct.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari filed by OPS seeks to portray the Ninth Circuit panel in *Hahn* as judicial renegades riding roughshod over settled antitrust principles, leaving health care plans across the nation no recourse but to circle the wagons and await rescue by this Court.

The court below, however, has charted no new waters, shifted no evidentiary burdens, and exposed health care plans to no new antitrust liabilities. It has merely reversed a summary judgment to permit the plaintiff Doctors to proceed to trial under § 1 of the Sherman Act against a physician-controlled health care plan that (1) excluded all podiatrists from membership; (2) agreed on maximum fees members would be paid for foot care procedures; and (3) agreed to reimburse nonmember podiatrists at a lower rate for the same procedures.

Finding the evidence submitted by plaintiff Doctors "akin" to the facts in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the court did not find OPS's conduct to be *per se* unreasonable but merely held that plaintiffs could proceed to trial, since "[i]f the OPS plan was, in fact, a horizontal agreement among competitors, it was unlawful *per se*." 868 F.2d at 1030.

Finding it doubtful that OPS had sustained its burden under *Matsushita* of putting forward a "plausible and justifiable explanation" for its refusal to admit podiatrists as members, but that plaintiffs had in any event met their burden of

rebuttal, the court held that plaintiffs were "entitled to go to trial on their group boycott theory." *Id.* at 1032.

REASONS FOR DENYING THE WRIT

The Ninth Circuit decided nothing more than whether a summary judgment of dismissal, not favored in antitrust cases in general, should be upheld. The posture of the case is not conducive to review by this Court. The issues implicated at this preliminary phase have, in any event, recently and comprehensively been addressed by this Court: summary judgment burdens in *Matsushita;* the validity of agreements among competing physicians to establish fees in *Maricopa;* the standards for *per se* versus rule of reason analysis of group boycotts in *Northwest Wholesale Stationers.*

In page after page and at a prodigious rate, OPS piles up citations to cases with which the *Hahn* opinion is said to "conflict." As detailed *infra,* not one of these decisions presents a true conflict justifying review. Each of the decisions relied upon by OPS was addressing unilateral action by single entities, or vertical arrangements, or an absence of any showing of conspiracy, of competition, or of antitrust injury. OPS's conclusory incantation of "conflict" is based only upon courts having reached different results than the Ninth Circuit on different facts than those before the Ninth Circuit. This is a flawed premise and does not satisfy Supreme Court Rule 17.1(a) or (c).

ARGUMENT

I. The Ninth Circuit's Conspiracy Theory Is Entirely Consistent With That Applied to Physician-Controlled Health Care Plans.

The Ninth Circuit cogently stated the "broad proposition" to be synthesized from cases that have addressed antitrust liability of health care plans: "health care plans may

reimburse members and nonmembers differently, both in price and manner, so long as physicians (or the relevant group of competitive providers) do not control the health care plan." *Hahn*, 868 F.2d at 1028-29. Since OPS was indisputably controlled by physicians, who were the relevant group of providers competing with podiatrists, the court permitted plaintiff Doctors' § 1 claim to go forward.

OPS has struggled mightily throughout this litigation to characterize itself as a "single corporate entity" engaged in "unilateral action" rather than a physician-controlled health care plan. The evidence before the Ninth Circuit demonstrated, however, that OPS was not an insurer, an indemnitor, a purchaser of medical services, or a third-party payor — *i.e.*, it did not stand in vertical relation to its member physicians.

Thus, the cases cited by OPS that purportedly are "in conflict" with the Ninth Circuit's ruling are simply not applicable to the facts before the Ninth Circuit: They deal with variations on the question of whether, as a matter of law, a single corporate entity can conspire with itself or whether, as a factual matter and under a higher evidentiary standard, a conspiracy between entities in a *vertical* relation was made out. *E.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (parent corporation and wholly-owned subsidiary legally incapable of conspiring with each other to violate § 1); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 765 (1984) (sufficient evidence for jury to find conspiracy between manufacturer and some of its distributors); *Potters Medical Center v. City Hospital Association*, 800 F.2d 568, 573 (6th Cir. 1986) (defendant hospital's attorney/board member, as well as a staff physician, lacked capacity to conspire with hospital); *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440, 1450 (9th Cir. 1988) (hospital and "independent contractor" anesthesiologists had sufficiently independent interests so that "collaborated conduct" between them was possible).

The remainder of the circuit court opinions cited by OPS as "in conflict" with the Ninth Circuit's handling of the conspiracy issue in *Hahn* are noteworthy only for the *absence* of evidence or even allegations of an agreement among or concerted action by physicians.

In *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985), the court specifically distinguished the facts before it from a case in which such physician control *was* shown. *Id.* at 925, *citing Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). Because in the case before it "Blue Shield and the doctors 'sit on opposite sides of the bargaining table,' " the *Kartell* court found *Maricopa* and *NCAA v. Board of Regents*, both "horizontal agreement" cases, "simply not on point." *Id.* at 925, 930.

Similarly distinguishable are *Cooper v. Forsyth County Hospital Authority*, 789 F.2d 278, 281 n. 12 (4th Cir. 1986), in which plaintiffs did not even allege a conspiracy among the members of the hospital's medical-dental staff, and *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367-68 (10th Cir. 1988), in which plaintiff made no allegation that the defendant hospital had allied itself with any other individual to unlawfully tie a patient's choice of physician.

OPS purports to address in Section I of its Petition the issue of whether its structure immunized it from a finding of conspiracy; however, within that section, at page 10, OPS interjects a quite different argument, *i.e.*, that the decisions relied upon by the Ninth Circuit require plaintiff Doctors to show that "actual competitors" in the same specialty as podiatrists controlled the membership and reimbursement policies of OPS. While plaintiff Doctors have structured this Brief in Opposition to mirror the sections of OPS's Petition, for the convenience of the Court, the issue of control by actual competitors is more logically addressed under Section IA, *infra*.

A. *The Ninth Circuit Applied the Classical Formulation of Competitor Control: OPS Was Controlled By Physicians Who Had Previously Pursued Their Own Interests Separately But Then Combined to Act as One for Their Common Benefit.*

The Ninth Circuit rejected the district court's conclusion that as a matter of law, a majority of the OPS board of trustees " 'would have no economic interest in restraining trade in the provision of foot care services in Portland' " because a majority of the physicians on a typical OPS board did not practice in the Portland metropolitan area and did not specialize in foot care. 868 F.2d at 1029. If the Ninth Circuit had *upheld* a requirement that plaintiff Doctors show complete identity of geographic area of practice and medical specialty between themselves and a majority of the board of a physician-controlled health care plan, *then* the Ninth Circuit holding would have been in conflict with decisions by this Court. *E.g., Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656, 657 n.1, 659-60 (1961); *Associated Press v. United States*, 326 U.S. 1, 26-27 (1945) (Frankfurter, J., concurring).

Such a decision would have imposed an unprecedented burden on antitrust plaintiffs and would in essence have rewarded an unlawful combination that reaches so many geographic markets and embraces such an array of competitors that it can always point to such scope and diversity to defeat the antitrust claims of a given competitor in a given location.

Rather, citing *Maricopa* and *Radiant Burners*, the Ninth Circuit articulated the "proper inquiry" with respect to competition:

> The proper inquiry is not whether individual board members themselves were in actual competition with the complaining nonmembers. Rather, the proper inquiry is whether practitioners sharing substantially similar economic interests collectively exercised control of a plan under

> whose auspices they have reached agreements which work to the detriment of competitors.

Hahn, 868 F.2d at 1029 and n.8.

That inquiry was unquestionably satisfied, for purposes of withstanding the summary judgment motion, by the evidence in the record. Based on scope of licensure alone, podiatrists and OPS member M.D.'s and D.O.'s are potential competitors. *Compare* ORS § 677.805(4) *with* ORS § 677.085(4). The court noted that from 1975 to 1981, "physicians were responsible for 90% of foot care billings to OPS." *Hahn*, 868 F.2d at 1030. And podiatrists were a particularly threatening class of potential competitors to M.D.'s and D.O.'s who provided foot care, since, unlike other non-M.D./D.O. health care providers with limited licenses, podiatrists may prescribe drugs and perform surgery.

The high level of *actual* competition for provision of foot care was documented by plaintiff Doctors: under OPS's discriminatory reimbursement policies, 10% of OPS's billings for foot care in the Portland metropolitan area were from podiatrists; during the same period, in the same market, but under the *nondiscriminatory* reimbursement policies of a different health care plan, Blue Cross of Oregon, *30%* of billings for foot care were from podiatrists. The Ninth Circuit concluded from the evidence that "many doctors [M.D.'s and D.O.'s] are direct competitors to podiatrists, at least as to some of their services." *Hahn*, 868 F.2d at 1029 and n.7.[8]

OPS's understanding of the nature of the competition that must be shown to make out a *prima facie* case of horizontal

[8] Plaintiff Doctors' solid showing of direct competition distinguishes this case from *Feldman v. Jackson Memorial Hospital*, 571 F. Supp. 1000 (S.D. Fla. 1983), *aff'd*, 752 F.2d 647 (11th Cir.), *cert. denied*, 472 U.S. 1029 (1985), cited by OPS at page 9, in which the plaintiff podiatrist failed to establish that a group of orthopedic surgeons were his competitors "in any meaningful sense." *Id.* at 1007.

conspiracy is flawed, as was the district court's in this case. At page 10 of its Petition, OPS incorrectly states that "the decisions," including *Pennsylvania Dental*, "narrowly hold that if *actual* competitors (not just generic 'physician') *directly* control the pricing and reimbursement (not just general management of the plan), plaintiffs may state a claim." This is an attempt to resurrect the requirement invented by the district court that to withstand a summary judgment dismissing their § 1 claim, plaintiff Doctors had to show OPS to be controlled by M.D. specialists in foot care practicing in Portland. No case cited by OPS or by the district court supports the imposition of such a requirement.

OPS misreads *Pennsylvania Dental*, in which the Third Circuit rejected plaintiff dentists' horizontal conspiracy claim because "only two members of [Blue Shield's] 32-member board are dentists," so only one-sixteenth of those making the alleged anticompetitive decisions were " 'themselves competitors in the relevant market.' " 745 F.2d at 258. "Generic physicians" did not, and could not, compete with dentists for provision of tooth care, and so the plan was not controlled by even *potential* competitors of plaintiffs.

Certainly, "specialist control" was not required by the court in *Virginia Academy;* it did not require dominance of the Blue Shield board by *psychiatrists*, the actual "specialist" competitors of plaintiff psychologists. *Physician* control of the board was sufficient to make the health care plan a horizontal combination.[9]

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[9] OPS's further argument, that the Ninth Circuit incorrectly relied upon *Virginia Academy* and that *Virginia Academy* "should be limited to its peculiar facts or overruled," OPS Petition at 10, is unsupported and unsupportable. As the Ninth Circuit noted, although *Virginia Academy* predated this Court's opinion in *Maricopa* by two years, the Fourth Circuit "followed substantially similar reasoning." 868 F.2d at 1028 n.4. Further, this Court discussed the reasoning of *Virginia Academy* without any indication of disapproval in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 469 n.4 (1982).

This Court has recognized that a showing of control of an entity by *potential* competitors of the plaintiffs is sufficient to make out a § 1 claim, and the Ninth Circuit so noted by citing *Radiant Burners, Inc. v. Peoples Gas, Light & Coke* Co., 364 U.S. 656, 657 n.1, 659-60 (1961), with an explanatory parenthetical: "(though only six among 'numerous' members of gas association directly competed with plaintiff, Sherman 1 claim was stated even in absence of proof that six direct competitors controlled association, because association as a whole shared substantially similar economic interests)." *Hahn*, 868 F.2d at 1029 n.8.

The reasons why concerted action by potential competitors supports § 1 liability were articulated by this Court more than 40 years ago, when over 1200 competitors for news nationwide joined together in an association that had the power to exclude applicants for membership from access to news sources:

> Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors. Each will know that the time may come when he will himself be faced with the application of a competitor; and that will be true even as to those in whose 'field' no applicant has yet appeared. Unless he supports those who now object to the admission of their competitor, he will not in the future be likely to get their support against his own.

Associated Press v. United States, 326 U.S. 1, 26-27 (1945) (Frankfurter, J. concurring).[10]

[10] OPS's additional argument that any conspiracy in this case must be vertical and not horizontal, OPS Petition at 11, because OPS was sued rather than individual physicians, must be rejected. Denomination of an association or society rather than individuals as defendant is not dispositive of conspiracy analysis. *See Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S.

(footnote continued on next page)

The Ninth Circuit's framing of the inquiry regarding competition, 868 F.2d at 1031, is entirely consistent with the *Associated Press* rationale, and in "conflict" with none of the cases cited by OPS.

In *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court addressed only the applicability of the McCarran-Ferguson Act exemption for the "business of insurance," 15 U.S.C. § 1012(b), to a Blue Shield prepaid prescription drug program; it is not clear why OPS cites this decision as relevant to the distinction between horizontal and vertical conspiracies. In *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433 (5th Cir. 1984), the Fifth Circuit analyzed the same plan, holding that the pharmacy agreements at issue "do not run between competitors in the pharmaceutical industry, nor between competitors in the insurance industry, but between individual pharmacies and Blue Shield, which does not compete with pharmacies." *Id.* at 1436-37. Finally, there was no allegation of physician control of the defendant insurance plans in *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 1985-CCH Trade Cases ¶ 66,849, 776 F.2d 1046 (5th Cir. 1985), *cert. denied*, 475 U.S. 1090 (1986). The court simply held that under *Copperweld*, the hospital service company and its wholly-owned subsidiary were incapable of conspiring and the plaintiff physician therefore incapable of making out a § 1 claim.

The Ninth Circuit is in conflict with none of these Fifth Circuit opinions. Instead, the OPS plan suffered from the same "Achilles heel" identified in *Royal Drug*: competing health care providers participated in setting fees for themselves and for excluded classes of competitors. 737 F.2d at 1436 n.1.

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556 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1960); *Associated Press v. United States*, 326 U.S. 1 (1945).

Neither do the First or Seventh Circuit decisions cited by OPS conflict with the Ninth Circuit's approach to horizontal conspiracy in *Hahn*. *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, 925 (1st Cir. 1984), *cert. denied*, 471 U.S. 1029 (1985) (no allegation or evidence that defendant Blue Shield plan was controlled by competing physicians); *Brillhart v. Mutual Medical Insurance, Inc.*, 768 F.2d 196, 199 (7th Cir. 1985) (vertical arrangement between plan and member physicians, with all physicians free to join; plaintiff chose not to).

Finally, *Hassan v. Independent Practice Associates*, 698 F. Supp. 679 (E.D. Mich. 1988), cited by OPS as "illustrative" of joint venture analysis, see Section IIB *infra*, is in fact illustrative of the correct approach to the "specialist control" or "actual competitor" requirement that OPS seeks to engraft onto § 1 analysis. In *Hassan*, defendants argued that because "persons with allergy testing privileges and competency did not control decision-making with regard to allergy testing reimbursement levels," plaintiff allergists could show no agreement among competitors for purposes of their price-fixing claim. The court disagreed:

> In *Maricopa*, the Court apparently assumed that there was a conspiracy; as plaintiffs point out, the individual practitioners in *Maricopa* included both general practitioners and specialists. The same thing happened in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L.Ed.2d 572 (1975), in which the Court found illegal a fee schedule that fixed the prices for title examinations. The Court made no distinction as to whether the committee setting the fee was controlled by lawyers who did title searches. Similarly, there is no reason to distinguish this case from the above. Health care providers do set the fee reimbursement in this case. In this case, it also appears that services performed by allergists are also provided by other physicians. For example, as plaintiffs point out, the IPA fee schedule sets a price for an initial exam as well as office

> visits, which schedule applies to all physicians (IPA Fee Schedule). Moreover, there is no question but that general practitioners see patients for many of the same ailments that an allergist might treat. Finally, at least one of the tests mentioned above that plaintiffs perform on all asthmatic patients, the pulmonary function studies, is also performed by other specialists, including cardiologists.

Id. at 687 (footnote omitted).

B. *The Ninth Circuit Followed* Matsushita *in Concluding That Plaintiff Doctors Had Made a Sufficient Factual Showing To Survive Summary Judgment and That the District Court Had Acted Precipitously in Dismissing Their Claims.*

The summary judgment standard applied by the Ninth Circuit is in accord with that developed by this Court, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as well as in *Matsushita*, 475 U.S. 574 (1986), in the specific context of antitrust claims. *Hahn*, 868 F.2d at 1026. *On the record before it*, the court found that plaintiff Doctors had produced sufficient evidence to withstand a motion for summary judgment and explicitly so stated:

> In other words, the appellants have introduced sufficient evidence to permit a trier of fact to conclude that the OPS plan was, in fact, 'an organization of physicians,' *Barry*, 805 F.2d at 868, or 'an agent [ ] of [its] member physicians,' *Virginia Academy*, 624 F.2d at 480. A trier of fact could reasonably conclude that the physician board members, even if not themselves competing directly with podiatrists, shared similar economic interests with those board members and OPS physicians who did compete directly, and that therefore the OPS board as a whole may have acted in the anticompetitive interests of those member physicians who compete with podiatrists for the provision of foot care.

868 F.2d at 1030.

Contrary to OPS's assertion, the summary judgment standard does not make it "an antitrust plaintiffs' burden to present sufficient evidence *to prove its case* on defendant's motion for summary judgment." OPS Petition at 14 (emphasis added), *citing Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1579-80 (11th Cir. 1988). What the Eleventh Circuit actually said in *Dunnivant* is that the nonmoving party has the burden of producing evidence "which creates a triable issue . . .". *Id.* at 1579. Nor does the standard set out in *Monsanto* permit the trial court to "balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action." *Matsushita*, 475 U.S. at 600 (White, J., dissenting), as the district court in *Hahn* seemed to do.

The Ninth Circuit's application of this standard to the record before it is not at odds with any of the circuit court decisions cited by OPS, in which little or no evidence was presented in opposition to summary judgment. *E.g., Dreiling v. Peugeot Motors of America, Inc.* 850 F.2d 1373, 1379 n.3 (10th Cir. 1988) (cautioning against reversal of summary judgment based on speculation as to what evidence plaintiffs "could" or "might" possibly adduce to support their theories); *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 103 (4th Cir. 1987) (evidence on summary judgment held to conclusively establish unilateral action by defendant hospital); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 477-79 (7th Cir.), *cert. denied*, ____U.S.____, 109 S. Ct. 137, 102 L. Ed. 2d 110 (1988) (plaintiff's evidence inadequate under *Matsushita* standard to withstand summary judgment on tying, boycott, and monopolization claims; court did not address the issue of conspiracy at all); *Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1032 (8th Cir. 1988) (where evidence showed that defendant Hospital Association had no authority or control over its member hospitals, plaintiffs' evidence that a member hospital once consulted the Association about a chiropractor seeking staff privileges did not rise above the level of a "metaphysical doubt" about a material fact

under *Matsushita* and did not exclude the possibility of independent or noninjurious action).

OPS cites *Houser v. Fox Theaters Management Corp.*, 845 F.2d 1225, 1229, 1231 n.13 (3d Cir. 1988) for the proposition that OPS "is not under any affirmative obligation to 'prove' the absence of conspiracy." OPS Petition at 14. No such burden was placed on OPS. The Ninth Circuit, having cited *Matsushita* for the standard of review, noted that where a plaintiff fails to produce any evidence of physician control of the price-setting entity, the agreements regarding prices and reimbursement would be upheld, *just as the court had done in Barry v. Blue Cross*, 805 F.2d 866 (9th Cir. 1986). Where there *is* evidence of a horizontal agreement among competing physicians, the agreements will be found unlawful under *Maricopa*. The evidence before the court was "more akin" to the latter and so plaintiff Doctors were correctly permitted to go forward to prove a conspiracy at trial.

Finally, nothing in *Pennsylvania Dental* constitutes a rejection of the principle that Blue Shield plans operating under the direction and control of member physicians, as agents of member physicians, are horizontal conspiracies. The Third Circuit did not reject application of the *Virginia Academy* court's conspiracy theory because it viewed it as analytically flawed; rather, *the court found that "the uncontroverted facts furnish no support for it."* 745 F.2d at 258 (emphasis added).

Similarly, the Fifth Circuit in *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 293-94 (5th Cir. 1988), held only that "a trade association is not *by its nature* a 'walking conspiracy,' its every denial of some benefit amounting to an unreasonable restraint of trade." (emphasis added). Unlike plaintiff Doctors in *Hahn*, plaintiffs in *Consolidated Metal Products* produced *no* evidence of conspiracy and in fact, on appeal they "no longer contend[ed] that

there was an anticompetitive conspiracy between its competitors and [the defendant trade association]." *Id.* at 293. The court's affirmance of summary judgment for the defendant is not surprising, and certainly not in conflict with the result in *Hahn*.

II. The Ninth Circuit Correctly Determined — After Surveying the Constellation of Health Care Plan Antitrust Cases — That Evidence Produced So Far Makes This Case "Akin to *Maricopa*."

In finding the case presented by plaintiff Doctors' evidence "akin to *Maricopa*," 868 F.2d at 1029, the Ninth Circuit indicated (1) that *Maricopa* governs when physicians control a health care plan, *id.* at 1027; (2) that *Maricopa* is one of the cases that stands for the "broad proposition" that where physicians or the "relevant group of competitive providers" control the health care plan, the plan may not reimburse members and nonmembers differently in price or manner, *id.* at 1028; and (3) that physicians are the "relevant group of competitive providers" with respect to podiatrists, in light of the scope of podiatrists' licensure and the number of medical specialties that perform the same procedures as podiatrists. *Id.* at 1029, 1030.

Plaintiff Doctors' evidence supports each of these three bases for application of the rationale of *Maricopa*. First, evidence showed that physicians formed a majority of the OPS board during all relevant years. OPS may cling to the mere existence of a 1978 amendment to the OPS bylaws that required 50% non-physician membership on the board; the evidence before the Ninth Circuit, however, in the form of testimony by Mr. Rod Bunnell, OPS Senior Vice President and General Counsel, established that the "goal" of a 50-50 ratio was not met for any one of the relevant years of this litigation.[11]

[11] CR 544 at 156.

Second, OPS reimbursed members and nonmembers differently. The difference in "manner" of reimbursement consisted of payment to members at a rate up to the 90th percentile of the "usual, customary and reasonable" rate. Nonmembers, on the other hand, were reimbursed based on a fixed indemnity schedule. The difference in "price" based on this "two-tier" system was also demonstrated: "Appellants produced evidence that, on average, OPS members received from OPS 76 cents on the dollar billed, while OPS paid podiatrists only 50 cents on the dollar billed." 868 F.2d at 1025.

OPS's attempt to cloud the issue by vague reference to "a number of different policies," OPS Petition at 18, is of no avail: Mr. Bunnell testified as follows:

> Q. Would you say that, as a general matter, and I'm not saying in all cases, I'm saying as a general proposition the overwhelming majority of policies issued by OPS, both group and individual, that member physicians were paid on a different basis than non-member physicians?
>
> A. Yes, I think that's a fair statement.[12]

OPS also alludes to "copayments, deductibles, and other charges," OPS Petition at 19; the record before the Ninth Circuit contained no evidence of the existence of such charges or the number of policies that contained them, or whether such charges were not in fact a *neutral* factor, paid equally whether the service was provided by a member or nonmember.

Finally, physicians were the "relevant group of providers" competing with podiatrists, *see* Section IA, *supra*, as evidenced by comparison of their licensures, review of medical specialties that performed podiatric procedures, and review of covered services under OPS contracts.

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[12] CR 544 at 213.

Thus the Ninth Circuit's conclusion that plaintiff Doctors could proceed to trial on their horizontal price-fixing claim is not in conflict with the First Circuit's decision in *Kartell*, the Third Circuit's decision in *Pennsylvania Dental*, or the Seventh Circuit's decision in *Brillhart*, in all of which plaintiffs made no showing that they were excluded from membership and as a consequence reimbursed in a different manner and at a different price by a plan controlled by their competitors.

Neither is there a conflict with the Second Circuit's holding in *Medical Arts Pharmacy v. Blue Cross*, 675 F.2d 502 (2d Cir. 1982), in which the court declined to apply per se price-fixing analysis to a prescription drug program similar to that in *Kartell*. Blue Cross was the purchaser of prescription drugs and therefore its establishment of the maximum price it would pay participating pharmacies was a benign agreement on price between the contracting parties themselves and not an illegal agreement to fix prices charged in transactions with third parties. The court specifically found that the plan was not a horizontal price agreement among competitors, as in *Maricopa*, and its reference to the Justice Department's position, OPS Petition at 18, notes that price agreements *among competing pharmacists* would be illegal horizontal price-fixing. *Id.* at 506 n.4.

A. *The Ninth Circuit Had No Reason to View Plaintiff Doctors As Lacking Standing: Both They and Their OPS Subscriber Patients Were Injured By OPS's Policies.*

Both plaintiff Doctors and their OPS subscriber patients were direct victims of OPS's anticompetitive practices in the relevant market for foot care.

The plaintiff Doctors received a lower rate of reimbursement and then had to decide whether to attempt to collect the full fee. They submitted evidence that they often did not balance bill in the interest of not alienating or losing the

subscriber as a patient. (The First Circuit's holding with respect to balance billing in *Kartell* has no application to the facts here; because the Blue Shield plan in *Kartell* was an independent health care insurer that did not exclude entire classes of health care providers from membership, its ban on balance billing by members was lawful.) Plaintiff Doctors also presented evidence of shifts in consumer demand away from podiatrists' services as a result of OPS reimbursement practices.

The subscribers' injuries occurred when they realized an obligation to pay an out-of-pocket balance to a nonmember podiatrist because of the lower rate of reimbursement by OPS for podiatrists' services.

This Court has recognized that "the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 475 n.11 (1982). The opinion in *McCready* also implies that if McCready had discontinued seeing the psychologist because of Blue Shield's reimbursement policies, the psychologist would have had standing to pursue an antitrust claim. *Id.* at 483.

Because of the evidence of lower rates of reimbursement and shifts in consumer demand, plaintiff Doctors are the point where price-fixing first was felt, like the wholesaler in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1976). Plaintiff Doctors are not precluded from bringing their claim because *others* may also have been injured by the anticompetitive practices at issue. The congressional intent behind the Sherman Act is to encourage individuals who suffer antitrust injury to act as " 'private attorneys general.' " *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). Further, there can be no duplicative recoveries if plaintiff Doctors pursue their claim; the statute of limitations bars any claim by OPS subscribers who did pay a balance bill, leaving the Doctors as the sole plaintiffs. 15 U.S.C. § 15b.

B. *The Ninth Circuit Recognized That Under* Maricopa, *OPS Had Not Shown Itself to Be the Type of Arrangement in Which Price Fixing Agreements Among Physicians Are Proper.*

The Ninth Circuit correctly noted that *Maricopa*'s *per se* analysis is controlling when there is "evidence to suggest that physicians controlled the . . . plan." *Hahn*, 868 F.2d at 1028. Because plaintiff Doctors' evidence was sufficient to raise an issue of fact regarding physician control, the court was correct to reverse the grant of summary judgment to OPS, holding that "[i]f the OPS plan was, in fact, a horizontal agreement among competitors, it was unlawful *per se*." *Id.* at 1030.

OPS makes much of footnote 5 in the Ninth Circuit's opinion, *id.* at 1029, characterizing it as "an attempt to expand liability beyond that found by this Court in *Maricopa* . . . ." OPS Petition at 23.

The footnote is faithful to and in no way conflicts with this Court's distinction between fee setting by a medical foundation "composed of individual practitioners who compete with one another for patients" and "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Maricopa*, 457 U.S. at 356.

In the circuit court decisions cited by OPS that address Blue Shield plans, *Kartell*, *Royal Drug*, *Medical Arts Pharmacy*, and *Pennsylvania Dental*, no evidence of provider control of the plans was presented. Consequently, these courts had no occasion to consider whether or not the Blue Shield plans at issue constituted legitimate joint ventures. OPS's reliance on these cases is misplaced.

Hassan v. Independent Practice Associates, 698 F. Supp. 679 (E.D. Mich. 1988), also cited by OPS, involved a true joint venture which was, under *Maricopa*, exempt from *per se* analysis. Independent Practice Associates (IPA), a corporation

made up of and owned by physicians and osteopaths, provided medical care to Health Plus, a health maintenance organization. The court found that IPA member physicians shared the risks of loss as well as the opportunities for profit by accepting a "capitation" payment from Health Plus (unlike the physicians in *Maricopa*). Evidence in the record indicated that these risks were real and that some physicians had lost the entire amount at risk (retained by Health Plus in a "risk withhold" fund) because their expenses exceeded the capitation payments made to them.

OPS presented no analogous evidentiary record on summary judgment. In *Hahn* as in *Maricopa*, "the fee agreements disclosed by the record in this case are among independent competing entrepreneurs." *Maricopa*, 457 U.S. at 357. The Ninth Circuit correctly treated OPS as neither an insurer nor a joint venture; having reviewed the *Maricopa* articulation of the types of arrangements among physicians pursuant to which price fixing would be proper, the court noted that "no such arrangement is present in this case." *Hahn*, 868 F.2d at 1029 n.5.

III. The Ninth Circuit Correctly Permitted the Group Boycott Claim to Proceed to Trial: Plaintiff Doctors Sustained Their Burden of Raising a Reasonable Inference to Rebut OPS's Alleged Procompetitive Justification for Its Conduct.

The Ninth Circuit required OPS to proffer a "plausible, justifiable explanation of its conduct" in excluding an entire class of competing health care providers from membership. *Hahn*, 868 F.2d at 1026, *citing Matsushita*, 475 U.S. at 588. OPS did not proffer one "plausible" or "justifiable" explanation, much less "a number of proper justifications for its conduct . . ." OPS Petition at 25. There was simply no evidence in the record to support its single claim of "problems with

podiatrist overutilization" as a justification for their exclusion and in fact the claim was so vague and unsupported that the reviewing court was unclear as to what OPS's contention was. *Hahn*, 868 F.2d at 1031 n.10.

The record did, however, raise a "reasonable inference, grounded in evidence, to refute OPS's claimed justification." *Id.* at 1031 (citing evidence from an OPS board member that considerations of cost or overbilling were never made, as well as evidence that podiatrists' costs for foot care were, in fact, lower than those of OPS member physicians).

Whether the exclusion of podiatrists can in fact be sustained or rather should be condemned "should be determined after a fully developed record at trial." *Id.* at 1032. OPS makes a conclusory assertion that in permitting the group boycott claim to proceed to trial, the Ninth Circuit here is in conflict with *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985). OPS then asserts that in *Northwest*, the Ninth Circuit had injected a "fairness" doctrine into boycott theory and its decision was reversed by this Court on that basis. OPS Petition at 26. OPS supplies no analysis of how, even if its reading of *Northwest* were correct, it has any application to the Ninth Circuit's treatment of the group boycott claim in *Hahn*.

In *Northwest*, there was a nondiscriminatory expulsion of a cooperative member under facially neutral bylaws. In *Hahn*, as the Ninth Circuit noted: "OPS does discriminate against a class of providers," and its two-tier fee system, "when coupled with OPS's long refusal to admit podiatrists," makes it "doubtful whether OPS was, in fact, 'willing to purchase services from all [practitioners] on equal terms.' " *Hahn*, 868 F.2d at 1031; *accord, Barry v. Blue Cross*, 805 F.2d 866, 873 (9th Cir. 1986) (no illegal boycott where Blue Cross "does not discriminate against a particular class of medical provider, but instead is willing to purchase services from all physicians on equal terms.").

There is also no conflict between the Ninth Circuit opinion and *Moore v. Boating Industries Associations*, 819 F.2d 693 (7th Cir.), *cert. denied*, ____U.S.____, 108 S. Ct. 160, 98 L. Ed. 2d 115 (1987), in which the court rejected plaintiffs' group boycott theory when plaintiffs presented no evidence of anti-competitive purpose or anticompetitive effect.

The First Circuit's decision in *Kartell* is, as discussed *supra*, distinguishable because there was no evidence that the Blue Shield plan was a horizontal combination; since Blue Shield was acting unilaterally, it had " 'a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.' " 749 F.2d at 932. Similarly, in *Pennsylvania Dental*, plaintiffs failed to show the concerted action necessary to establish an illegal boycott. 745 F.2d at 259-60. Finally, the Fifth Circuit in *Royal Drug* began its group boycott analysis with the point that dispositively distinguishes the case from *Hahn*: every pharmacy had the same option to participate in the plan.

A. *The Ninth Circuit Appropriately Found Plaintiff Doctors' Evidence of Actual Detrimental Effects Sufficient to Take Their Group Boycott Claim to Trial.*

Plaintiff Doctors showed actual adverse effects on competition for foot care services from OPS's membership and reimbursement policies: podiatrists were excluded from acting as "equal competitors" with OPS member physicians in providing foot care to 25% of the insured patients in the Portland metropolitan area,[13] and consumer demands for podiatrists' services shifted to OPS member physicians who performed foot care.

[13] While OPS insured 16% of the total population of the Portland metropolitan area, plaintiff Doctors presented evidence from their economics expert witness that in a selected year (1982), OPS insured over 25% of the *insured* population of the Portland metropolitan area. CR 597 at 9.

Under this Court's reasoning in *Indiana Federation*, plaintiff Doctors' showing was sufficient to withstand a motion for summary judgment, even absent proof of market power, since " 'proof of actual detrimental effects . . .' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " 476 U.S. at 460-61.

Plaintiff Doctors submitted evidence to the district court, in support of their motion for summary judgment, that although podiatrists' share of the foot care market was 30% under a nondiscriminatory plan, it had been cut to 10% under the OPS reimbursement scheme, during the same time period and in the same market. This effect was calculated by plaintiffs' economics expert witness to represent $690,000 in revenues shifted from the six plaintiff Doctors to OPS member physicians;[14] this calculation did not take into account the additional lost revenues of other Oregon podiatrists. These shifts demonstrated skewing of consumer preference, "actual detrimental effects" in the foot care market that require no further proof of OPS's market share.

Plaintiff Doctors did, however, present evidence of market power: from 1975 to 1981, physicians were responsible for 90% of foot care billings to OPS, which the Ninth Circuit found to suggest that "OPS member physicians are a significant competitive force in the Portland foot care market." *Hahn*, 868 F.2d at 1030.

Considerations of "pure" market power, for purposes of, *e.g.*, a monopolization claim under § 2, must be distinguished from market power as a "surrogate" for actual detrimental effects upon competition. Where antitrust plaintiffs make a showing of actual anticompetitive effects, the need for the surrogate is obviated and plaintiffs' claim may go forward.

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[14] CR 548 at 148.

B. *The Ninth Circuit Had Before It Evidence of Injury to Competition for Provision of Foot Care in the Form of Documented Shifts in Consumer Demand for Podiatrists' Services.*

As detailed in Section IIIA *supra*, plaintiff Doctors presented evidence of antitrust injury to competition, in the form of price-sensitive shifts in consumer demand for podiatrists' services; affidavits of former patients of plaintiff Doctors were submitted, documenting that after learning of OPS's lower level of reimbursement to podiatrists, patients declined to return to podiatrists for foot care for financial reasons.

In the cases cited by OPS as being in "conflict" with the Ninth Circuit's decision in this case, courts found only proof of injury to the individual plaintiff competitors and no injury to competition, a scenario quite distinct from that presented by the record in this case. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (loss of anticipated profits inadequate antitrust injury); *Kartell*, 749 F.2d 922 (1st Cir. 1984) (where effect of alleged predatory pricing by Blue Shield, as a single-entity insurer, would impact insurance market, possibility of injury to physician/supplier of medical services too remote and indirect to confer standing); *Irving Ear, Nose, Throat & Allergy Clinic v. Group Hospital Service, Inc.*, 776 F.2d 1046 (5th Cir. 1985) (plaintiff physician showed only that insurer's cost containment program injured *his* practice and reduced *his* income); *Zinser v. Rose*, 868 F.2d 938 (7th Cir. 1989) (claim that insurers unilaterally set limits on reimbursement for chiropractic services, with no allegation or evidence of horizontal conspiracy, insufficient to support claim of antitrust injury).

CONCLUSION

Because the Ninth Circuit's opinion is in harmony rather than in conflict with the decisions of this Court and the other circuits that have addressed competitor-controlled health care plans, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

DATED this 2nd day of August, 1989.

Respectfully submitted,

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